Supreme Court, U.S.
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No. 02-1377

In the Supreme Court of the United States

BUCK DOE, PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Privacy Act, 5 U.S.C. 552a, an individual who has proven a violation of the Privacy Act, but cannot prove actual damages, is automatically entitled to $1000 in damages.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-60a) is reported at 306 F.3d 170. The decision of the district court (Pet. App. 61a-68a), adopting in part the report and recommendation of the magistrate judge (Pet. App. 69a-104a), is unreported.

JURISDICTION

The court of appeals entered its judgment on September 20, 2002. A petition for rehearing was denied on November 15, 2002. Pet. App. 1a-2a. On January 23, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 15, 2003, and the petition was filed on March 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act, 5 U.S.C. 552a, regulates executive agencies' disclosure of private, personal information, including social security numbers, to other governmental components and to the public. The Privacy Act authorizes private civil actions when an agency, *inter alia*, "fails to comply" with the terms of the Privacy Act "in such a way as to have an adverse effect on an individual." 5 U.S.C. 552a(g)(1)(D). If the agency "acted in a manner which was intentional or willful," the United States

> shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. 552a(g)(4).

2. The Department of Labor's Office of Worker Compensation Programs has long used the voluntarily provided social security numbers of claimants seeking Black Lung Benefits as internal identifiers in the adjudication of their claims. Prior to this case, administrative law judges responsible for Black Lung Benefits cases routinely issued multi-captioned hearing notices containing those same black-lung claim identifiers—that is, the claimants' social security numbers—to claimants, their attorneys, coal companies, and insurance carriers. The administrative law judges also frequently issued opinions, some of which were published,

that included the claimants' social security numbers as their black-lung claim identifiers. See Pet. App. 5a.[1]

Petitioner and six other black-lung claimants filed lawsuits against the Secretary of Labor under the Privacy Act, alleging that the Department's practice of disclosing claimants' social security numbers to third parties while processing Black Lung Benefits claims violates the Privacy Act. Pet. App. 5a-6a. The cases were consolidated, and the Department consented to the entry of a stipulated order under which it agreed to discontinue its use of social security numbers on multi-captioned hearing notices and to otherwise ensure that its Black Lung Benefits program complied with the Privacy Act. *Id.* at 6a. The plaintiffs then sought to certify a class of "all claimants for Black Lung Benefits since the passage of the Privacy Act." *Ibid.* In support of a claim for damages, petitioner submitted an affidavit in which he stated that the disclosure of his social security number had "torn me all to pieces," and that "no amount of money could compensate me for worry and fear of not knowing when someone would use my name and social security number." *Id.* at 76a.

The district court denied class certification and granted summary judgment for the Department with respect to all claims for damages, except for petitioner's. Pet. App. 61a-68a; see also *id.* at 69a-104a (report and recommendation of magistrate judge). With respect to petitioner, the district court agreed

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[1] While the external disclosure of social security numbers was erroneous, the Office of Workers Compensation Programs was authorized, under the Privacy Act, 5 U.S.C. 552a(b)(3), to use the claimants' social security numbers as internal identifiers and to disclose them to parties associated with each claimant's case. See 58 Fed. Reg. 49,548, 49,597 (1993) (notice of routine use).

with the government that proof of actual damages was required, *id.* at 66a & n.2, but concluded that petitioner had submitted "sufficient incontrovertible evidence * * * that he suffered 'actual damages,' in the form of emotional distress," and awarded him the "statutory minimum amount" of damages of $1000, *id.* at 66a-67a.

3. a. The court of appeals reversed the district court's grant of summary judgment to petitioner, and otherwise affirmed the district court's grant of summary judgment to the Department. Pet. App. 3a-60a.[2] The court rejected petitioner's argument that he was automatically entitled to recover $1000 for having proven an intentional or willful violation of the Privacy Act, holding that the Privacy Act's remedial provision requires plaintiffs to demonstrate some "actual damages" before they may recover the statutory minimum award of $1000. *Id.* at 9a.

The court of appeals noted, first, that Congress restricted the minimum $1000 damages award to a "person entitled to recovery," 5 U.S.C. 552a(g)(4)(A). By placement of that phrase within a subsection "the sole and entire purpose of which is to limit the liability of the United States to actual damages sustained," Pet. App. 9a, the court explained, "Congress has defined 'recovery' (albeit indirectly) by its express limitation of the Government's liability to actual damages sustained." *Ibid.* The provision thus serves only to "provide[] for a 'statutory minimum' to actual damages" in cases "where actual damages are greater than $0 but less than $1,000." *Ibid.* That reading "gives effect to the eminently reasonable * * * presumption that the legislature correlated the plaintiff's recovery entitlement with the defendant's liability by limiting the plaintiff's recovery to actual damages and by providing, by way of incentive to suit, for at least a minimum recovery even where actual damages are minimal." *Id.* at 10a. At the same time, the court concluded, Congress's decision only "to *augment* damages awards for persons able to demonstrate some 'actual damages' * * * serve[d] a competing objective: preventing the imposition of potentially substantial liability for violations of the Act which cause no 'actual damages' to anyone." *Id.* at 11a n.2.

The court also found its reading to be compelled "as a grammatical matter," because, "having just defined the recovery that will be permitted against the United States" in terms of actual damages, "it would torture all grammar to conclude that the phrase 'a person entitled to recovery' references anyone other than one who has sustained actual damages." Pet. App. 10a (emphasis omitted). Had Congress intended to allow an automatic award of $1000, without any showing of actual damages, the court explained, it could have done so "unequivocally" through "clear" language. *Id.* at 10a-11a.

Finally, because the Privacy Act's remedial provisions are a limited waiver of sovereign immunity, the court concluded that the scope of the waiver had to be "strictly construed . . . in favor of the sovereign." Pet. App. 13a-14a (citation omitted).

Having predicated petitioner's entitlement to recovery on a showing of actual damages, the court concluded that petitioner's allegations of emotional upset, which did not include "any evidence of tangible consequences stemming from his alleged angst over the disclosure of his [social security number]," Pet. App.

[2] None of the other plaintiffs has sought this Court's review of the court of appeals' judgment affirming dismissal of their claims.

17a, did not constitute sufficient evidence of actual damages to sustain an award under Section 552a(g)(4)(A).[3]

b. Judge Michael dissented from the court's holding that an individual must prove actual damages to receive an award of $1000 under Section 552a(g)(4)(A). Pet. App. 24a-60a. Admitting that the "question is somewhat close," *id.* at 30a, and that his reading of the statute "is not inevitable," *id.* at 45a, Judge Michael would have held that a plaintiff "can recover statutory damages of $1,000 upon proof that he has suffered an adverse effect as a result of an intentional or willful violation of the Privacy Act," *id.* at 25a. In Judge Michael's view, that reading better comports with "policy considerations" and "Congress's purposes." *Id.* at 47a.

ARGUMENT

Because the decision of the court of appeals is correct and there is no mature conflict in the courts of appeals, this Court's review is not warranted.

1. Petitioner contends (Pet. 11-12) that this Court should grant review to resolve a conflict in the circuits on whether a plaintiff must prove actual damages to receive a $1000 award under Section 552a(g)(4)(A). No such concrete circuit conflict exists. The Sixth Circuit appears to share the Fourth Circuit's view. *Hudson* v. *Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1998), overruled in part on other grounds, *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001). Beyond that, the court of appeals' opinion in this case is the first to undertake a direct and considered analysis of the question. All of the court of

[3] Petitioner has not sought further review of that aspect of the court of appeals' holding.

appeals' decisions on which petitioner relies simply mention the availability of relief in passing, while resolving other questions under the Privacy Act, or order relief in the absence of any dispute between the parties about the scope of the remedy. See Pet. App. 12a n.3 ("Nor has any court examined closely the question we consider today, and none has analyzed the text of the statute at all.").

Petitioner relies primarily (Pet. 11) on the Eleventh Circuit's decision in *Fitzpatrick* v. *IRS*, 665 F.2d 327 (1982). That case, however, decided only the question whether Section 552a(g)(4)(A)'s use of the phrase "actual damages" refers to general or compensatory damages or, instead, to out-of-pocket pecuniary losses. See *id.* at 328 (reciting court's holding). The court did not analyze the separate question of whether any showing of damages was necessary to recover the $1000, simply referring to it as "the statutory minimum." *Ibid.* Furthermore, the Internal Revenue Service, as appellee in that case, did not contest the plaintiff's entitlement to that $1000 award. *Id.* at 329. The court thus had no occasion to address the question of statutory construction resolved by the court of appeals here.

Likewise, in *Johnson* v. *Department of Treasury*, 700 F.2d 971 (5th Cir. 1983), the question before the court was whether "actual damages" includes non-pecuniary damages for mental injuries. See *id.* at 972. In one footnote, the court of appeals commented that "[t]he statutory minimum of $1000, of course, is recoverable." *Id.* at 977 n.12. But that was dictum, entirely unnecessary to the resolution of the case, in which the plaintiff was granted recovery based on a finding that he suffered actual damages. *Id.* at 986. The comment is also in tension with the court's acknowledgment that Congress "reject[ed] liability for presumed damages,"

id. at 982, and that Congress was "concerned about the drain on the treasury created by a rash of Privacy Act suits," *id.* at 978 n.15 (citation omitted). See also *Parks* v. *IRS*, 618 F.2d 677 (10th Cir. 1980) (cited at Pet. 12) (deciding only that mental distress or psychological harm may constitute actual damages).

Wilborn v. *Department of Health & Human Services*, 49 F.3d 597 (9th Cir. 1995), is also of no help to petitioner. That case decided liability issues under the Privacy Act, and it was only in closing that the court noted that "Wilborn has limited the damages he seeks to the statutory minimum of $1,000," and awarded him that amount. *Id.* at 603. Nothing in the opinion indicates that the award was made in the absence of some proof of actual damages. Contrary to petitioner's assertion (Pet. 12), the question also remains open in the D.C. Circuit. Compare *Waters* v. *Thornburgh*, 888 F.2d 870, 872 (D.C. Cir. 1989) (cited at Pet. 12) (addressing only liability issues under the Act and noting, ambiguously, that a plaintiff who establishes liability "is entitled to the greater of $1,000 or the actual damages sustained"), with *Molerio* v. *FBI*, 749 F.2d 815, 826 (D.C. Cir. 1984) (stating that a cause of action under the Privacy Act requires proof of "actual damages sustained").

In the absence of a concrete or mature conflict in the circuits, this question, which has been adverted to by courts of appeals only sporadically in the last 23 years, does not warrant this Court's review.[4]

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[4] Petitioner argues (Pet. 13-16) that the enactment of other statutes, such as the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, and the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2707, enhances the importance of the question presented. But petitioner cites no evidence of conflicting court decisions arising under those statutes. Nor does he demonstrate that the construction of statutes like the Electronic Communications Privacy Act, which authorizes monetary remedies against parties "other than the United States," 18 U.S.C. 2707(a), would necessarily control the interpretation of a statute providing a limited waiver of the sovereign immunity of the United States from money damages.

2. Contrary to petitioner's argument (Pet. 16-20), the court of appeals' decision is correct. First, the phrase "person entitled to recovery" appears only after the statute has confined the remedy available to aggrieved individuals to "actual damages." The phrase is thus not logically or naturally read to disavow the very limitation on recovery—a showing of "actual damages" —that the Act just imposed. Instead, the structure of the sentence requires a plaintiff first to demonstrate "actual damages sustained" and, only then, does he become eligible for a minimum damages award of $1000. Had Congress intended to create an automatic damages award, it would likely have phrased the remedial provision with a disjunctive "or," permitting recovery of $1000 *or* "actual damages sustained."

Petitioner's supposition (Pet. 16) that "person entitled to recovery" refers to a plaintiff who has established liability ignores the fact that, throughout the remedial provision, a prevailing plaintiff is referred to as an "individual," not a "person entitled to recovery." See 5 U.S.C. 552a(g)(1)(A), (B), (C) and (D); 5 U.S.C. 552a(g)(2)(A) and (4). The label "person entitled to recovery" appears for the first and only time in the actual damages provision, and thus functionally serves to describe that particular class of prevailing individuals who have established some level of actual damages.

Second, because the Privacy Act's remedial provision constitutes a limited waiver of sovereign immunity, any

lingering ambiguity in the statutory language "is to be strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Contrary to petitioner's view (Pet. 18), that rule of strict construction "applies even to determination of the scope of explicit waivers." *United States* v. *Williams*, 514 U.S. 527, 541 (1995) (Scalia, J., concurring) (citing *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992)). Explicit waivers of sovereign immunity must not be "enlarge[d] . . . beyond what the language requires." *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992) (quoting *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 686 (1927)).

Third, contrary to petitioner's argument (Pet. 17), that reading harmonizes the statute's "adverse effect" and damages provisions. Section 552a(g)(1)(D) generally provides that an individual may sue an agency under the Privacy Act whenever the agency violates the statute "in such a way as to have an adverse effect" on the individual. 5 U.S.C. 552a(g)(1)(D). The requirement of an adverse effect does not speak to a plaintiff's recovery, however. It establishes standing under the Privacy Act. See *Quinn* v. *Stone*, 978 F.2d 126, 135 (3d Cir. 1992); *Parks*, 618 F.2d at 682-683 & n.2. It is well settled that a plaintiff may be able to satisfy standing requirements even if he cannot ultimately establish a right to money damages. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).[5]

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[5] Petitioner's reliance (Pet. 19, 20) on snippets of legislative history characterizing the $1000 statutory damages remedy as "liquidated damages" is to no avail. That legislative history pertained to a prior, more generous version of the legislation that was never enacted. Beyond that, the argument overlooks that "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996); see also *Nordic Vill.*, 503 U.S. at 37 ("If clarity does not exist [in statutory text], it cannot be supplied by a committee report.").

Finally, petitioner's reliance (Pet. 20) on the Privacy Act Guidelines issued by the Office of Management and Budget (OMB) is misplaced. The Guidelines do not address the predicate issue of whether some showing of actual damages must be made before a recovery will be allowed. They provide only that a liable agency will be required to pay "[a]ctual damages or $1,000, whichever is greater," when found guilty of intentional or willful violations of the Privacy Act. 40 Fed. Reg. 28,970 (1975). Indeed, in recognition of the principle that waivers of sovereign immunity must be strictly construed, OMB does not construe its Guidelines to require the payment of $1000 in the absence of any showing of actual damages.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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